

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

M. ANGELICA CONEJO, ) NO. ED CV 10-706-AS  
)  
)  
Plaintiff, ) **MEMORANDUM OPINION AND**  
)  
v. ) **ORDER OF REMAND**  
)  
CAROLYN W. COLVIN, Acting )  
Commissioner of Social )  
Security, )  
)  
Defendant. )

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**PROCEEDINGS**

On May 27, 2010, Plaintiff filed a Complaint seeking review of the Commissioner's denial of Plaintiff's application for disability benefits and supplemental security income ("SSI"). (Docket Entry No. 4). On April 14, 2011, pursuant to the parties' stipulated remand, the Court remanded this case for further administrative proceedings, and retained jurisdiction pursuant to sentence six of 42 U.S.C. § 405(g). (Docket No. 15). After the proceedings on

1 remand resulted in a decision unfavorable to Plaintiff, on May 2,  
2 2013, the parties stipulated to reopen the matter (Docket Entry No.  
3 16), and the Court ordered the case reopened (Docket Entry No. 17).  
4

5 On August 9, 2013, Defendant filed an Answer and the  
6 Administrative Record ("A.R."). (Docket Entry Nos. 19, 20). On  
7 August 21, 2013, the matter was transferred and referred to the  
8 current Magistrate Judge. (Docket Entry No. 21). The parties have  
9 consented to proceed before a United States Magistrate Judge.  
10 (Docket Entry Nos. 23-24). On January 14, 2014, the parties filed  
11 a Joint Stipulation ("Joint Stip.") setting forth their respective  
12 positions regarding Plaintiff's claims. (Docket Entry No. 25). On  
13 August 25, 2014, pursuant to the Court's request, Defendant  
14 supplemented the Administrative Record. (Docket Entry Nos. 34,  
15 35). The Court has taken this matter under submission without oral  
16 argument. See C.D. Local R. 7-15; "Case Management Order," filed  
17 June 2, 2010. (Docket Entry No. 2).  
18

#### 19 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

20  
21 Plaintiff, a former sales clerk-cashier (A.R. 250), asserts  
22 disability beginning January 1, 2004, based on alleged physical and  
23 mental impairments. (Id. 10, 132). The Administrative Law Judge,  
24 Michael D. Radensky ("ALJ"), examined the record and heard  
25 testimony from Plaintiff and vocational expert ("VE"), David A.  
26 Rinehart, on January 3, 2012. (Id. 245, 258-95).  
27

28 On January 18, 2012, the ALJ issued a decision denying

1 Plaintiff's application for benefits. (Id. 245-51). The ALJ found  
2 that Plaintiff has the "severe combination of impairments" of  
3 obesity, fibromyalgia, and depression. (Id. 248). The ALJ also  
4 determined that Plaintiff's medically determinable impairments of  
5 depression and obesity were nonsevere as they did not cause more  
6 than minimal limitation in her ability to perform basic mental work  
7 activities. (Id. 246, 248). The ALJ determined that,  
8 notwithstanding these impairments, Plaintiff assertedly retains  
9 the residual functional capacity ("RFC") to perform the full range  
10 of light work and that she is able to perform her past relevant  
11 work as a sales clerk-cashier. (Id. 249-50).

12  
13 Accordingly, the ALJ found that Plaintiff was not disabled at  
14 any time from the alleged disability onset date through the date of  
15 the ALJ's decision. (Id. 250).

#### 16 17 **PLAINTIFF'S CONTENTIONS**

18  
19 Plaintiff contends that the ALJ erred: (1) in his assessment  
20 of Plaintiff's credibility; (2) in failing to properly evaluate  
21 Plaintiff's mental impairment; and (3) by incorporating by  
22 reference a prior decision vacated by the Appeals Council, thereby  
23 violating the Appeals Council's remand order. (Joint Stip. 3-4).

#### 24 25 **STANDARD OF REVIEW**

26  
27 This Court reviews the Commissioner's decision to determine  
28 if: (1) the Commissioner's findings are supported by substantial

1 evidence; and (2) the Commissioner used proper legal standards. 42  
2 U.S.C. § 405(g); see Carmickle v. Comm'r, 533 F.3d 1155, 1159 (9th  
3 Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007).  
4 "Substantial evidence is more than a scintilla, but less than a  
5 preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
6 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.  
7 1997)). It is relevant evidence "which a reasonable person might  
8 accept as adequate to support a conclusion." Hoopai, 499 F.3d at  
9 1074; Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)). To  
10 determine whether substantial evidence supports a finding, "a court  
11 must 'consider the record as a whole, weighing both evidence that  
12 supports and evidence that detracts from the [Commissioner's]  
13 conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.  
14 1997) (citation omitted); see Widmark v. Barnhart, 454 F.3d 1063,  
15 1066 (9th Cir. 2006) (inferences "reasonably drawn from the record"  
16 can constitute substantial evidence).

17  
18 This Court "may not affirm [the Commissioner's] decision  
19 simply by isolating a specific quantum of supporting evidence, but  
20 must also consider evidence that detracts from [the Commissioner's]  
21 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987)  
22 (citation and internal quotation marks omitted); Lingenfelter v.  
23 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007) (same). However, the  
24 Court cannot disturb findings supported by substantial evidence,  
25 even though there may exist other evidence supporting Plaintiff's  
26 claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th Cir. 1973).  
27 "If the evidence can reasonably support either affirming or  
28 reversing the [Commissioner's] conclusion, [a] court may not

1 substitute its judgment for that of the [Commissioner]." Reddick,  
2 157 F.3d 715, 720-21 (9th Cir. 1998) (citation omitted).

3  
4 **APPLICABLE LAW**

5  
6 "The Social Security Act defines disability as the 'inability  
7 to engage in any substantial gainful activity by reason of any  
8 medically determinable physical or mental impairment which can be  
9 expected to result in death or which has lasted or can be expected  
10 to last for a continuous period of not less than 12 months.'" Webb  
11 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting 42 U.S.C.  
12 § 423 (d) (1) (A)). The ALJ follows a five-step, sequential analysis  
13 to determine whether a claimant has established disability. 20  
14 C.F.R. § 404.1520.

15  
16 At step one, the ALJ determines whether the claimant is  
17 engaged in substantial gainful employment activity. Id. §  
18 404.1520(a)(4)(i). "Substantial gainful activity" is defined as  
19 "work that . . . [i]nvolves doing significant and productive  
20 physical or mental duties[] and . . . [i]s done (or intended) for  
21 pay or profit." Id. §§ 404.1510, 404.1572. If the ALJ determines  
22 that the claimant is not engaged in substantial gainful activity,  
23 the ALJ proceeds to step two which requires the ALJ to determine  
24 whether the claimant has a medically severe impairment or  
25 combination of impairments that significantly limits his ability to  
26 do basic work activities. See id. § 404.1520(a)(4)(ii); see also  
27 Webb, 433 F.3d at 686. The "ability to do basic work activities"  
28 is defined as "the abilities and aptitudes necessary to do most

1 jobs." 20 C.F.R. § 404.1521(b); Webb, 433 F.3d at 686. An  
2 impairment is not severe if it is merely "a slight abnormality (or  
3 combination of slight abnormalities) that has no more than a  
4 minimal effect on the ability to do basic work activities." Webb,  
5 433 F.3d at 686.

6  
7 If the ALJ concludes that a claimant lacks a medically severe  
8 impairment, the ALJ must find the claimant not disabled. Id.; 20  
9 C.F.R. § 1520(a)(ii); Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th  
10 Cir. 2005) (ALJ need not consider subsequent steps if there is a  
11 finding of "disabled" or "not disabled" at any step).

12  
13 However, if the ALJ finds that a claimant's impairment is  
14 severe, then step three requires the ALJ to evaluate whether the  
15 claimant's impairment satisfies certain statutory requirements  
16 entitling him to a disability finding. Webb, 433 F.3d at 686. If  
17 the impairment does not satisfy the statutory requirements  
18 entitling the claimant to a disability finding, the ALJ must  
19 determine the claimant's RFC, that is, the ability to do physical  
20 and mental work activities on a sustained basis despite limitations  
21 from all his impairments. 20 C.F.R. § 416.920(e).

22  
23 Once the RFC is determined, the ALJ proceeds to step four to  
24 assess whether the claimant is able to do any work that he or she  
25 has done in the past, defined as work performed in the last fifteen  
26 years prior to the disability onset date. If the ALJ finds that  
27 the claimant is not able to do the type of work that he or she has  
28 done in the past or does not have any past relevant work, the ALJ

1 proceeds to step five to determine whether - taking into account  
2 the claimant's age, education, work experience and RFC - there is  
3 any other work that the claimant can do and if so, whether there  
4 are a significant number of such jobs in the national economy.  
5 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); 20 C.F.R. §  
6 404.1520(a)(4)(iii)-(v). The claimant has the burden of proof at  
7 steps one through four, and the Commissioner has the burden of  
8 proof at step five. Tackett, 180 F.3d at 1098.

## 10 DISCUSSION

11  
12 After consideration of the record as a whole, the Court finds  
13 that the Commissioner's findings are *not* supported by substantial  
14 evidence or free from material<sup>1</sup> legal error. For the reasons  
15 discussed below, the case is remanded under sentence four of 42  
16 U.S.C. Section 405(g).

### 18 A. The ALJ Materially Erred in Evaluating Plaintiff's Credibility

19  
20 Plaintiff asserts that the ALJ erred in assessing Plaintiff's  
21 credibility because he failed to "utilize the techniques outlined  
22 by the Ninth Circuit for determining credibility," made statements  
23 that are inconsistent with the medical record, and failed to  
24 provide specific, clear, and convincing reasons for challenging

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25  
26 <sup>1</sup> The harmless error rule applies to the review of  
27 administrative decisions regarding disability. See McLeod v.  
28 Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart,  
400 F.3d 676, 679 (9th Cir. 2005) (stating that an ALJ's decision  
will not be reversed for errors that are harmless).

1 Plaintiff's credibility. (Joint Stip. 5-7). Plaintiff also  
2 contends that "the ALJ limited his analysis" to Plaintiff's  
3 "purported ability to walk, her poor effort on one consultative  
4 grip test," her failure to fully describe the intensity of her  
5 fatigue to her physicians, and inferred that she was malingering.  
6 (Id. 11).

7  
8 The ALJ noted Plaintiff's testimony as follows:

9  
10 [S]he testified . . . that she had to lay down and  
11 nap four to six times a day on a regular basis for a half  
12 to two hours at a time because of her pain although she  
13 also complained of being unable to sleep at night because  
14 the medication for sleep no longer helped her. However,  
15 she stressed that her medication made her sleepy and how  
16 she was seeing a pain management specialist on a monthly  
17 basis for epidural injections as well as other shots in  
18 the areas where she has pain. [¶] . . . The claimant  
19 reportedly admitted substantial improvement of her pain  
20 with each injection as well as reporting relief of pain  
21 with her medication, which included Vicoprofen and  
22 Robaxin, and there was no indication of any complaints of  
23 medication side effects. [¶] . . . The medical evidence  
24 of record like her prehearing statements and hearing  
25 testimony does reflect complaints of pain all over her  
26 body, but the record does not support the degree of  
27 limitations alleged. She has said that her family does  
28 everything for her, but it is clear that she was overly



1 dramatic at the hearing, and in fact livened up a bit  
2 when talking about things she liked. She admitted that  
3 she drove her daughter to school sometimes and helped  
4 with homework, but otherwise maintained that her husband  
5 and son took care of everything for her.

6  
7 (A.R. 250).

8  
9 Where, as here, the ALJ finds that a claimant suffers from a  
10 medically determinable impairment that could reasonably be expected  
11 to produce his or her alleged symptoms, the ALJ must evaluate "the  
12 intensity, persistence, and functionally limiting effects of the  
13 individual's symptoms . . . to determine the extent to which the  
14 symptoms affect the individual's ability to do basic work  
15 activities. This requires the [ALJ] to make a finding about the  
16 credibility of the individual's statements about the symptom(s) and  
17 its functional effect." Soc. Sec. Ruling ("SSR") 96-7p.

18  
19 An ALJ's assessment of a claimant's credibility is entitled to  
20 "great weight." Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th  
21 Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985).  
22 The ALJ may not discount the claimant's testimony regarding the  
23 severity of the symptoms without making "specific, cogent"  
24 findings. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see  
25 also Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010)  
26 (reaffirming same); but see Smolen, 80 F.3d at 1283-84 (indicating  
27 that ALJ must provide "specific, clear and convincing reasons to  
28 reject a claimant's testimony where there is no evidence of

malingerer); see Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990).<sup>2</sup> Generalized, conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the [ALJ] rejected [the] claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony") (citation and internal quotation marks omitted); Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must "specifically identify the testimony [the ALJ] finds not to be credible and must explain what evidence undermines the testimony"); Smolen, 80 F.3d at 1284 ("The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion."); see also SSR 96-7p.

An ALJ may consider a range of factors in assessing credibility, including "(1) ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the claimant's

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<sup>2</sup> In the absence of evidence of "malingerer," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Chaudhry v. Astrue, 688 F.3d 661, 670, 672 n.10 (9th Cir. 2012); Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012); Taylor v. Comm'r, 659 F.3d 1228, 1234 (9th Cir. 2011); Valentine v. Comm'r, 574 F.3d 685, 693 (9th Cir. 2009); Ballard v. Apfel, 2000 WL 1899797, at \*2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting cases). As set forth infra, the ALJ's findings in this case are insufficient under either standard, so the distinction between the two standards (if any) is academic.

1 daily activities." Ghanim v. Colvin, --- F.3d ----, 2014 WL  
2 4056530, at \*7 (9th Cir. Aug. 18, 2014) (quoting Smolen, 80 F.3d at  
3 1284; accord Orn v. Astrue, 495 F.3d 625, 636 (9th Cir. 2007)).  
4

5 Here, the ALJ, after considering the record and the testimony  
6 presented at the hearing, found Plaintiff's statements concerning  
7 the intensity, persistence and limiting effects of her symptoms  
8 "not credible to the extent they are inconsistent with" the ALJ's  
9 RFC. (A.R. 249).  
10

11 Contrary to her testimony, the medical records  
12 reflect good response to medication, and there is no  
13 clinical evidence of any problems with standing, walking  
14 or sitting, but rather repeated reports of no apparent  
15 distress and no problems with walking or anything more  
16 than some tenderness over her spine without any muscle  
17 spasm, sensory or motor changes, or limitation of spinal  
18 motion. Her medications are consistent with only mild to  
19 moderate pain, there are repeated references to good  
20 response to medication without medication side effects,  
21 and there is certainly no mention of the alleged frequent  
22 need for naps of up to two hours at a time.  
23

24 (Id. 250).  
25

26 Thus, the ALJ discounted Plaintiff's credibility for the  
27 following reasons: (1) the objective medical evidence does not  
28 fully support either the degree of limitation, or the degree of

1 pain and fatigue alleged by Plaintiff; (2) there were internal  
2 inconsistencies in Plaintiff's complaints; and (3) treatment and  
3 conservative medications provide relief. (Id.).  
4

5 The Court finds that the ALJ failed to state legally  
6 sufficient reasons for his adverse credibility finding.  
7

### 8 **1. Objective Medical Evidence**

9

10 Although a claimant's credibility "cannot be rejected on the  
11 sole ground that it is not fully corroborated by objective medical  
12 evidence, the medical evidence is still a relevant factor . . ."  
13 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Lack of  
14 supporting objective medical evidence is a key consideration for  
15 the ALJ in evaluating credibility. See 20 C.F.R. §§  
16 404.1529(c)(4), 416.929(c)(4) (in determining disability, an ALJ  
17 must evaluate a claimant's statements about the intensity,  
18 persistence and limiting effects of her symptoms "in relation to  
19 the objective medical evidence and other evidence").  
20

21 Here, the ALJ discounted Plaintiff's credibility based in part  
22 on a finding that the objective medical evidence does not fully  
23 support the degree of limitation alleged by Plaintiff. (Id. 250).  
24 The ALJ noted that there is "no clinical evidence" of any problems  
25 standing, walking, or sitting, and repeated reports of "no apparent  
26 distress and no problems with walking or anything more than some  
27 tenderness over her spine without any spasm, sensory or motor  
28 changes, or limitation of spinal motion." (Id.). He also found

1 that the medical records do not reflect the degree of pain and  
2 fatigue alleged by Plaintiff. (Id.).

3  
4 The ALJ and Defendant also point out that (1) the reports of  
5 Plaintiff's treating physician, Dr. Loomba, reflect normal range of  
6 motion, normal muscle strength, normal sensation, and negative  
7 straight leg raising tests (A.R. 250; Joint Stip. 8 (citing A.R.  
8 405, 407, 410, 413, 417)); (2) the internal medicine consultative  
9 examiner and the orthopedic examiner both opined that Plaintiff  
10 could work with some limitations, finding only mild objective  
11 findings (Joint Stip. 8 (citing A.R. 146-50, 390-94)); (3) the  
12 consultative examiners also noted no problem with walking and/or  
13 sitting (id. (citing A.R. 148, 263-64, 391)); and (4) Plaintiff's  
14 physicians generally reported no difficulties in walking (id.  
15 (citing A.R. 168, 173, 178, 181, 185)).<sup>3</sup>

16  
17 A review of the record, however, reveals that the ALJ's  
18 findings only reflect part of the record. For instance, a November  
19 17, 2011, note from an urgent care visit for a headache, seems to  
20 possibly indicate that Plaintiff's heel walking and toe walking  
21 were abnormal. (A.R. 449). Dr. Loomba also consistently mentioned  
22 that on examination of Plaintiff's back and neck, Plaintiff had  
23 "tenderness in cervical paraspinal muscles," and "tenderness in  
24 lumbar paraspinal muscles, increased pain with flexion of the

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25  
26 <sup>3</sup> The Court's review of the record reveals that only one of  
27 the cited documents actually mentions an assessment of Plaintiff's  
28 gait and stance. (See, e.g., A.R. 168 ("Gait And Stance:  
Normal.")). The other pages that are cited do not mention walking  
at all. (See, e.g., A.R. 173, 178, 181, 185).

1 spine, [and] increased pain with extension of the spine.” (Id.  
2 405, 407, 410, 413, 417; see also id. 420, 422, 424, 428, 432, 436,  
3 438, 440). The Court finds itself ill equipped to determine which,  
4 if any, of Dr. Loomba’s clinical findings are or are not  
5 significant in light of Plaintiff’s impairments. Indeed, in the  
6 context of fibromyalgia the Ninth Circuit has recognized that  
7 objective findings often “do not establish the presence or absence  
8 of [the disease].” Jordan v. Northrop Grumman Corp., 370 F.3d 869,  
9 872 (9th Cir. 2003), overruled on other grounds by Abatie v. Alta  
10 Health & Life Ins., 458 F.3d 955, 970 (9th Cir. 2006) (en banc).  
11 In Jordan, the court recognized that objective tests are  
12 administered to rule out other diseases and alternative  
13 explanations for the pain, but do not themselves establish the  
14 presence or absence of fibromyalgia, as that condition cannot be  
15 objectively proven. Id. at 877.

16  
17 The ALJ also found that the record does not support the degree  
18 of fatigue alleged by Plaintiff as there was no mention in the  
19 medical record of Plaintiff’s frequent need for naps. (A.R. 250).  
20 A review of Dr. Loomba’s records, however, shows that Plaintiff  
21 complained of fatigue at every visit. (See, e.g., id. 404, 406,  
22 409, 412, 416, 417, 419, 421, 427, 429, 437). More importantly,  
23 the records reflect that after treating Plaintiff for almost six  
24 months, Dr. Loomba prescribed Provigil in October 2009. (Id. 433).  
25 According to its official website, Provigil is “used to improve  
26 wakefulness in adults who experience excessive sleepiness . . . .”  
27 Provigil Website, <http://www.provigil.com> (last visited August 22,  
28 2014). It appears, therefore, that Dr. Loomba was aware of

1 Plaintiff's complaints of daytime fatigue and concerned enough  
2 about these complaints to prescribe a medication to help Plaintiff  
3 stay awake.  
4

5 Thus, the ALJ's reliance on the objective medical evidence in  
6 this case was not a clear and convincing reason for discounting  
7 Plaintiff's credibility. Even if the ALJ's reliance on the  
8 objective evidence was deemed to be a clear and convincing reason  
9 for discounting Plaintiff's credibility, it cannot be the sole  
10 legally sufficient reason. As discussed below, because the Court  
11 finds that the other reasons given by the ALJ for discounting  
12 Plaintiff's credibility are also not legally sufficient, the matter  
13 must be remanded.  
14

## 15 **2. Inconsistent Statements**

16

17 The ALJ pointed to inconsistencies in Plaintiff's complaints  
18 as a basis for discounting Plaintiff's credibility. For example,  
19 although Plaintiff testified that because of her pain she had to  
20 nap and/or rest four to six times a day for up to two hours at a  
21 time, she also complained that she was unable to sleep at night  
22 because her sleep medication no longer helped her. (A.R. 249; but  
23 see id. 447 ("no sleep complaints"). Although she complained she  
24 was unable to sleep at night because her sleep medication no longer  
25 helped her, she also complained that her medication made her  
26 sleepy. (Id. 249-50).  
27

28 Inconsistencies in a claimant's testimony are a valid factor

1 to be considered in weighing a claimant's credibility. Thomas v.  
2 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); Burch, 400 F.3d at  
3 680 ("In determining credibility, an ALJ may engage in other  
4 techniques of credibility evaluation, such as . . . inconsistencies  
5 in claimant's testimony"); Tonapetyan v. Halter, 242 F.3d 1144,  
6 1148 (9th Cir. 2001) (claimant's inconsistent statements were  
7 specific and convincing reason for discounting the testimony); see  
8 also 20 C.F.R. §§ 404.1529(c), 416.929(c).

9  
10 In this case, however, Plaintiff's statements regarding  
11 fatigue, frequent napping/resting during the day, and inability to  
12 sleep well at night are not necessarily inconsistent: pain may  
13 necessitate rest during the day, result in napping and, in turn,  
14 result in difficulty sleeping at night either because of prior  
15 daytime sleep, or because of pain interrupting sleep at night.  
16 Additionally, as previously discussed (see Discussion supra Part  
17 A.1), although Dr. Loomba's records do not specifically mention  
18 Plaintiff's frequent naps/rests during the day, it is clear that  
19 Dr. Loomba was aware of Plaintiff's daytime fatigue, and was  
20 treating this symptom with medication.

21  
22 Accordingly, the ALJ's reliance on Plaintiff's inconsistent  
23 statements is not supported by the record and is not a clear and  
24 convincing reason to discount Plaintiff's allegations.

25 ///

26 ///

27 ///



1           **3.     Conservative Medication and Positive Response**  
2           **to Treatment**

3  
4           The ALJ noted that Plaintiff's medications were "consistent  
5 with only mild to moderate pain," her medications and other  
6 treatment provided her pain relief, and there was no indication of  
7 any complaints of medication side effects. (A.R. 250 (citing id.  
8 404-41)).

9  
10          However, a review of Dr. Loomba's records reveals that as of  
11 July 2011 Plaintiff was taking three different prescribed pain  
12 medications: Gabapentin, Robaxin, and Vicoprofen. (See, e.g., id.  
13 404; see also id. 308). There is nothing in the record to support  
14 the ALJ's perfunctory statement that these medications are  
15 prescribed for "only mild to moderate pain," especially in light of  
16 the fact that all three were being prescribed at the same time.  
17 Furthermore, over the course of the time that she treated  
18 Plaintiff, Dr. Loomba not only adjusted Plaintiff's pain and  
19 sleep/wakefulness medications, but also suggested additional  
20 treatment options of lumbar and cervical injections in order to  
21 help Plaintiff better manage her pain.<sup>4</sup> (Id. 404-41).

22  
23          Although the ALJ reported that Plaintiff experienced relief  
24 from her medications and other treatments, there is no indication  
25 in the record that such relief was inconsistent with her testimony.

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26  
27          <sup>4</sup> The ALJ only found the medication regimen to be  
28 "conservative"; he does not appear to deem the spinal injections to  
be a conservative form of treatment.

1 On numerous visits to Dr. Loomba between June 15, 2009 and July 12,  
2 2011, Plaintiff reported that her pain is relieved by "medications,  
3 rest," massage, heat and/or epidural injections, that the pain  
4 medications are helping, and/or that after receiving injections in  
5 September 2009, November 2009, September 2010, February 2011, and  
6 March 2011, there was a decrease in pain, ranging between 30 and  
7 80%. (See, e.g., id. at 404, 406, 409, 412, 416, 419, 421, 427,  
8 431, 433, 435, 437). However, at each of her visits, Plaintiff  
9 also fairly consistently rated her average pain between 7/10 and  
10 10/10, and there is nothing to suggest that she was ever without  
11 pain, even after receiving the injections. (Id.). Additionally,  
12 Plaintiff continued to periodically receive these injections, which  
13 suggests that any benefit from them was not long lasting.

14  
15 Plaintiff also repeatedly informed Dr. Loomba that her pain  
16 symptoms were aggravated by physical activity, including movement,  
17 sitting, standing, and walking. (Id. 404, 406, 409, 412, 416, 417,  
18 419, 421, 427, 429, 437). She consistently described her pain to  
19 Dr. Loomba as burning, dull aching, constant, sharp, shooting, and  
20 radiating, and sometimes with cramping or numbness. (Id.) These  
21 statements are consistent with her testimony at the hearing. (See,  
22 e.g., id. at 261-63).

23  
24 The ALJ discounted Plaintiff's credibility because she did not  
25 report any side effects from her medications. In assessing a  
26 claimant's credibility about her symptoms, an ALJ may consider "the  
27 type, dosage, effectiveness, and side effects of any medication."  
28 20 C.F.R. § 404.1529(c). However, in this case, there does not

1 appear to be any connection between the ALJ's finding that  
2 Plaintiff takes her medication without any reported side effects,  
3 and Plaintiff's credibility.

4  
5 Thus, the Court finds that, when read as a whole, the record  
6 in this case does not undermine Plaintiff's testimony of pain and  
7 fatigue. Ghanim, 2014 WL 4056530, at \*8. Rather, the record  
8 consistently reveals that despite some occasional signs of  
9 improvement, Plaintiff continues to suffer from, and be treated  
10 for, pain, fatigue, and sleep disturbances. The Court also finds  
11 that the ALJ's stated reasons for discounting Plaintiff's  
12 credibility do not sufficiently allow the Court to conclude that  
13 the ALJ discounted Plaintiff's credibility on legally permissible  
14 grounds.

15  
16 **B. Plaintiff's Mental Impairments Should Be Reconsidered on**  
17 **Remand**

18  
19 The ALJ noted that, with respect to Plaintiff's mental  
20 impairment, Plaintiff has had "little treatment for her varying  
21 complaints of anxiety and depression and that they responded  
22 quickly to medication." (A.R. 248 (citing id. 164, 167-68, 172,  
23 177, 180, 184, 188, 190)).<sup>5</sup> He found that although Plaintiff

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24  
25 <sup>5</sup> The Court's review of these documents reveals that some of  
26 the cited pages do *not* fully support the ALJ's finding. For  
27 instance, one treatment note never mentions Plaintiff's medications  
28 and reflects only a routine visit for sinusitis (A.R. 177), and  
another reflects that Plaintiff reported insomnia, decreased  
interest, increased feelings of worthlessness, decreased energy,  
(continued...)

1 stated at the hearing that she is very depressed, she has not  
2 received any formal mental health treatment and there is "even less  
3 evidence of depression and anxiety than at the time of the prior  
4 decision in 2003." (Id.). Therefore, the ALJ concluded that  
5 Plaintiff's mental impairment causes no more than mild limitation  
6 in concentration, persistence, or pace, and that "even in  
7 conjunction with her medically determinable physical impairments,"  
8 is nonsevere and non limiting in terms of mental functioning.  
9 (Id.).

10  
11 Plaintiff contends that the ALJ erred in failing to properly  
12 evaluate Plaintiff's mental impairment and that the ALJ's finding  
13 that her depression was nonsevere is not supported by substantial  
14 evidence. (Joint Stip. 12). In support of this contention,  
15 Plaintiff cites to many of the same medical records that the ALJ  
16 identified as indicating diagnoses or assessments of depression and  
17 anxiety due to chronic muscle/joint pain, and accompanied by sleep  
18 disturbance. (Id. (citing A.R. 167, 168, 172, 180, 183, 184, 188,  
19 189, 403, 410, 413, 417, 440)). Plaintiff also points out that she  
20 has been, and is being, treated for depression with medications.<sup>6</sup>

21  
22 <sup>5</sup>(...continued)  
23 increased difficulty in concentrating, and anxiety attacks (id.  
24 190).

25 <sup>6</sup> The record reflects that in 2007 a physician's assistant  
26 noted Plaintiff's complaints of depression, resulting in fatigue.  
27 (Id. 166-68, 172-88). Plaintiff was treated with Cymbalta, and  
28 reported that it "helped her significantly." (Id. 172, 180, 184).  
Some of these same notes, however, also indicate that Plaintiff  
still feels "very anxious," paranoid, and depressed (see, e.g., id.  
(continued...))

1 (Id.) .

2  
3 As this case is being remanded for the ALJ to reconsider  
4 Plaintiff's credibility, which in turn may support Plaintiff's  
5 complaints regarding her mental impairments, the Court does not  
6 reach the merits of Plaintiff's claim that the ALJ erred in finding  
7 Plaintiff's mental impairments to be nonsevere. The Court will  
8 instead direct this issue to be reassessed on remand.

9  
10 **C. The ALJ's Incorporation of the Prior Decision Was Not Error**

11  
12 After this Court remanded the matter pursuant to the parties'  
13 stipulation, the Appeals Council vacated the 2008 decision and  
14 remanded the matter "for a new hearing, any further action to  
15 complete the record and a new decision." (A.R. 316). In his 2012  
16 decision, the ALJ noted that "the prior decision issued April 8,  
17 2008 is incorporated by reference herein and remains the decision  
18 of record as supplemented herein below." (Id. 246).

19  
20 Plaintiff contends that the 2012 decision was inconsistent  
21 with the remand order because the ALJ did not make a new decision,

22 \_\_\_\_\_  
23 (...continued)  
24 172, 180), and it appears that her Cymbalta dosage was increased as  
25 a result (id. 173). Dr. Loomba's records show that from July 2009  
26 through August 2010 Plaintiff was taking Elavil and Fluoxetine  
27 (Prozac) (id. 437), and Plaintiff's December 2011 list of  
28 medications includes Prozac, but not Elavil, as a current  
medication as of that date (id. 388). On November 22, 2011,  
Plaintiff reported to treating physician, Dr. Lopa, that her mood  
was stable on Prozac. (Id. 445).

1 he merely reiterated the old decision. (Joint Stip. 17). The  
2 Court does not agree.

3  
4 After reviewing the record, the Court finds that, although the  
5 ALJ referenced the previous decision and incorporated it by  
6 reference, his decision was otherwise complete in and of itself at  
7 every step of the evaluation process. (A.R. 245-51). The ALJ  
8 included a complete discussion of the fact that there was little or  
9 no change in the nature and severity of Plaintiff's medically  
10 determinable impairments since 2003, including her obesity, which  
11 had not been mentioned in the 2003 decision. (Id. 246). He also  
12 considered and discussed the new medical evidence submitted for the  
13 hearing as well as some of the earlier medical evidence. (Id. 245-  
14 51). Finally, the ALJ provided a thorough (albeit flawed)  
15 discussion of Plaintiff's credibility.

16  
17 Generally, it is not improper for an ALJ to incorporate a  
18 previous decision and supplement it with a subsequent decision.  
19 See, e.g., Walker v. Astrue, No. EDCV 08-971 DSF (FFM), 2010 WL  
20 2305849, at \*11 (C.D. Cal. June 4, 2010) (citing Mason v. Astrue,  
21 No. ED CV 08-240-E, 2008 WL 4382662, at \*2 (C.D. Cal. Sept. 11,  
22 2008)). Moreover, it would elevate form over substance to require  
23 an ALJ to actually copy the past findings, rather than incorporate  
24 them by reference, especially where, as here, the remand was due to  
25 an administrative issue involving a missing document and did not  
26 relate to any concerns regarding the substantive issues in the  
27 ALJ's 2008 decision. See, e.g., Alsyouf v. Astrue, No. EDCV 11-

1 1867-SS, 2013 WL 327794, at \*12 (C.D. Cal. Jan. 29, 2013).

2  
3 The Court finds that the ALJ did not err or violate the  
4 Appeals Council's order by issuing a new decision, which happened  
5 to incorporate the 2008 decision, after conducting a new hearing.

6  
7 **D. Remand Is Appropriate**

8  
9 The decision whether to remand for further proceedings or  
10 order an immediate award of benefits is within the district court's  
11 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.  
12 2000). Where no useful purpose would be served by further  
13 administrative proceedings, or where the record has been fully  
14 developed, it is appropriate to exercise this discretion to direct  
15 an immediate award of benefits. Id. at 1179 ("[T]he decision of  
16 whether to remand for further proceedings turns upon the likely  
17 utility of such proceedings."). However, where, as here, the  
18 circumstances of the case suggest that further administrative  
19 review could remedy the ALJ's errors, remand is appropriate.  
20 McLeod, 640 F.3d at 888 (9th Cir. 2011); Harman, 211 F.3d at 1179-  
21 81.

22  
23 The Court has determined that the ALJ's credibility findings  
24 were not sufficiently specific to allow this Court to conclude that  
25 the ALJ rejected Plaintiff's testimony on permissible grounds and  
26 did not arbitrarily discredit her testimony. After reassessing  
27 Plaintiff's credibility on remand, the ALJ should revisit the issue

1 of Plaintiff's mental impairment in light of his credibility  
2 determination.

3  
4 **CONCLUSION**

5  
6 For all of the foregoing reasons,<sup>7</sup> this matter is remanded for  
7 further administrative action consistent with this Opinion.

8  
9 LET JUDGMENT BE ENTERED ACCORDINGLY.

10  
11 DATED: August 27, 2014.

12 /s/

13 \_\_\_\_\_  
14 ALKA SAGAR  
15 UNITED STATES MAGISTRATE JUDGE  
16  
17  
18  
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21  
22  
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25  
26 <sup>7</sup> The Court has not reached any other issue raised by  
27 Plaintiff except insofar as to determine that reversal with a  
28 directive for the payment of benefits would not be appropriate at  
this time.